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Federal Communications Commission
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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Policy and Rules Concerning the Interstate, Interexchange Marketplace | ) | CC Docket No. 96-61 Part II |
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| Implementation of Section 254(g) of the Communications Act of 1934, as amended | ) | |

# MOTION FOR PARTIAL STAY OR REQUEST FOR EXTENSION

**GTE SERVICE CORPORATION, on behalf of its affiliated telecommunications companies, and the MICRONESIAN TELECOMMUNICATIONS CORPORATION**

Ward W. Wueste
Gail L. Polivy
**GTE SERVICE CORPORATION**
1850 M Street, N.W.
Suite 1200
Washington, DC 20036
(202) 463-5200

R. Michael Senkowski
William B. Baker
Daniel E. Troy
Angela N. Watkins
**WILEY, REIN & FIELDING**
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Their Attorneys

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## MOTION FOR PARTIAL STAY OR REQUEST FOR EXTENSION

GTE Service Corporation ("GTESC"),[1] on behalf of its affiliated telecommunications companies, and the Micronesian Telecommunications Corporation ("MTC")[2] (collectively "Petitioners"), pursuant to Section 1.43 of the Commission's Rules,[3] respectfully request an immediate stay of the enforcement of Paragraph 69 of the *Report and Order*, FCC 96-331 (released Aug. 7, 1996) in the above-captioned proceeding.[4] Paragraph 69 requires MTC to integrate its interexchange rates with

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1 GTE Service Corporation is a wholly owned entity that provides legal and other shared administrative support services for GTE-affiliated companies.

2 MTC is a subsidiary of GTE Hawaiian Telephone Company Incorporated ("GTE Hawaiian Tel"), which, in turn, is a subsidiary of GTE Corporation. MTC provides both local and long distance telecommunications services from the Commonwealth of the Northern Mariana Islands.

3 47 C.F.R. § 1.43.

4 *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation Section 254(g) of the Communications Act of 1934, as amended,* 11 FCC Rcd 9564, 9598 (1996) ("*Report and Order*").

those charged by other affiliated carriers. As detailed below, the Commission should either stay Paragraph 69 of the *Report and Order* until the Commission acts on GTESC's pending Petition for Reconsideration and Clarification [5] or extend the deadline for GTE-affiliated carriers to file their tariff revisions. In the event of a reconsideration decision adverse to GTESC, the Commission should stay enforcement of Paragraph 69 pending judicial review, given the surprising and unprecedented nature of the agency's reading of Section 254(g) of the Telecommunications Act of 1996 ("1996 Act").[6]

The Petitioners respectfully request that the Commission act on this motion by June 20, 1997. If the FCC has not acted at the end of that time, the Petitioners intend to seek a stay from the Court of Appeals.

## INTRODUCTION AND SUMMARY

The Micronesian Telecommunications Corporation ("MTC") is but one of several affiliates providing interexchange telecommunications services under the ultimate parent company, GTE Corporation. MTC, the incumbent local exchange carrier in the Commonwealth of the Northern Mariana Islands ("CNMI"), provides exchange, exchange access, and domestic and international facilities-based interexchange services from the Northern Mariana Islands.

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5 *See* GTE Service Corporation's Petition for Reconsideration and Clarification, CC Docket No. 96-61, Part II (filed Sept. 16, 1996) ("Petition").

6 As a result of the FCC's continued inaction, GTESC is contemporaneously filing with the Court of Appeals for the D.C. Circuit an Emergency Petition for a Writ of Mandamus asking the Court to compel the FCC to act on GTESC's Petition.

Besides MTC, GTE Corporation owns several other subsidiaries that have operated separately for years, including, *inter alia*, GTE Hawaiian Tel. GTE Hawaiian Tel provides local exchange and certain interexchange services from Hawaii to the offshore U.S. points, including the CNMI, but not to the U.S. Mainland. GTE Card Services Incorporated ("GTE Card Services"), both through its debit card division and its resale interexchange division (GTE Long Distance), provides long distance service within the U.S. Mainland and Hawaii and from those points to the Northern Mariana Islands and other offshore points, but does not originate service from the CNMI.

Other GTE affiliates include GTE Mobilnet Incorporated and its cellular service subsidiaries, GTE Railfone, and GTE Airfone Incorporated. These companies offer interexchange services as a component of their cellular, air-to-ground, and other mobile services to domestic locations, including offshore points.

In the 1996 Act, Congress amended the Communications Act of 1934, by, *inter alia*, adding new Section 254(g). Section 254(g) requires "that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State."[7] In its August 7, 1996, *Report and Order* implementing Section 254(g),[8] the Commission "require[d] providers of interexchange service to integrate services offered to subscribers in Guam and the Northern Marianas with services

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7 47 U.S.C. § 254(g).

8 *See supra* note 4.

offered in other states no later than August 1, 1997."[9] The Commission further determined that Section 254(g) requires GTE Corporation to integrate the rates charged by its affiliates for interexchange services, including services offered to subscribers in the CNMI by MTC.[10]

On September 16, 1996, GTESC timely filed a Petition for Reconsideration and Clarification ("Petition") asking the Commission to reconsider its determination and recognize that each GTE affiliate is a separate "provider" of interexchange services for purposes of the rate integration requirement of Section 254(g). This Petition has been pending for nine months. Due to the Commission's inaction, on May 30, 1997, GTESC submitted a letter to the FCC asking the agency to issue a decision on the pending Petition no later than June 13, 1997, or, in the alternative, to extend the applicable tariff filing deadlines until such a decision could be made.[11] The Commission has yet to act on either the Petition or the Request. Accordingly, the Petitioners urge the Commission either to stay the Commission's requirement that GTE Corporation integrate rates across its affiliates pending resolution of the Petition or extend the deadline for GTE-affiliated carriers to file tariff revisions.

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9 *Report and Order* at 9597.

10 *Id.* at 9598.

11 *See* Request for Prompt Resolution of GTE Service Corporation's Pending Petition for Reconsideration and Clarification or, in the Alternative, for Extension of Tariff Filing Deadlines, CC Docket No. 96-61, Part II (filed May 30, 1997) ("Request").

As demonstrated more fully below, the Petitioners readily satisfy the four factors considered in granting a stay: (1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood of irreparable injury to the party seeking the stay, absent such relief; (3) the absence of harm to others if a stay is granted; and (4) the public interest in granting a stay.[12]

(1) Likelihood of Success on the Merits. The Petitioners are likely to succeed on the merits for the following reasons:

- The Commission lacks legal authority to require GTE Corporation to integrate interstate interexchange rates across all of its affiliates.
- Both the law and the actual operations of the GTE-affiliated carriers confirm that they are, in fact, separate operating companies.
- Congress intended the Commission to incorporate, not contradict, past FCC rate integration policies.

(2) Irreparable Injury. If allowed to stand, the Commission's mandate of rate integration across affiliates will cause immediate and irreparable harm to MTC and other GTE affiliates in the following ways:

- By requiring MTC to integrate its rates with those of other affiliated carriers, the Commission will force MTC to charge non-compensatory rates. The result will be unrecoverable losses that MTC has no legal remedy to recoup. In addition, neither MTC nor GTE Corporation will be able to recover these losses by raising rates above competitive levels for other services.

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12 *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

- The Commission's inaction poses harm to MTC by threatening to undermine its credibility in the marketplace as customers perceive themselves to be on a "rate rollercoaster."

- The Commission's inaction on GTESC's Petition harms MTC and other GTE affiliates by creating considerable uncertainty in the marketplace. These entities face the dilemma of either (1) complying with the Commission's mandate by the August 1 deadline, which would result in significant unrecoverable costs, or (2) failing to comply, which carries with it the potential for sanctions.

(3) Harm to Others. No significant harm to third parties will result from granting the stay. Indeed, the issuance of a stay will merely preserve the *status quo* during the pendency of this proceeding and harm neither consumers nor competitors. A stay is warranted for the following reasons:

- Consumers in the offshore points are not entitled to rate integration across separate carriers. They are entitled only to integrated rates from their particular "provider." Consequently, requiring MTC to offer rates integrated across all GTE affiliates will result in an unwarranted windfall for consumers at the expense of MTC.

- The Commission's delay threatens competition in the telecommunications market of the CNMI. Requiring MTC to offer significantly low and non-compensatory rates could disadvantage existing competitors, as well as eliminate the ability or incentive for future competitors to enter the market.

- The FCC can ensure the protection of third parties by imposing an accounting mechanism until the pending Petition is resolved. The difference in the rate levels, plus the appropriate interest, could be accounted for and distributed to consumers in the event that the FCC's ruling is upheld. Such an approach is fully consistent with the issuance of a stay and will protect MTC from suffering significant unrecoverable losses.

(4) Public Interest. The public interest strongly supports a stay. Indeed, the public interest is furthered when the Commission acts consistently with past policies, makes decisions promptly, and provides guiding principles, when necessary. In

addition, a stay will allow the Commission time to provide the guidance that is critical to complying with the 1996 Act's rate integration requirement without harming MTC and other GTE affiliates.

*  *  *

Because the four-part test for a stay is readily met, the Petitioners request that the Commission grant its motion and stay Paragraph 69 of the *Report and Order*, which requires GTE Corporation to integrate rates across its affiliates, pending action on GTESC's Petition for Reconsideration and Clarification. Due to the magnitude of the immediate harm that MTC and other GTE-affiliated carriers will suffer if they must comply by the August 1 deadline, the Petitioners respectfully request that the Commission act on this motion as expeditiously as possible and in any event by June 20, 1997. If the Commission has not acted at the end of that time, the Petitioners intend to seek a stay from the Court of Appeals.

## ARGUMENT

### I. THE PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE COMMISSION LACKS THE LEGAL AUTHORITY TO REQUIRE GTE CORPORATION TO INTEGRATE INTEREXCHANGE RATES ACROSS ITS AFFILIATES.

The Commission has exceeded the mandate of Section 254(g) of the 1996 Act. Section 254(g) provides as follows:

> INTEREXCHANGE AND INTERSTATE SERVICES - Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to *its subscribers* in any other State.[13]

By its explicit terms, the statute requires the Commission to adopt rules implementing rate integration. Specifically, those rules must require that "a provider" of interstate interexchange services have rates in each State no higher than rates charged to "its subscribers" in any other State.

Notwithstanding this clear statutory direction to integrate rates charged by "a provider" to "its subscribers," the Commission interprets the term "provider" to include parent companies that themselves provide no services, but through affiliates, provide

[13] 47 U.S.C. § 254(g) (emphasis added).

service in more than one state.[14] The Commission thus concludes "that GTE, for purposes of Section 254(g), constitutes a 'provider' of interexchange services within the meaning of that section, and that it must integrate rates across affiliates."[15] In other words, under the Commission's interpretation, all of the GTE interexchange companies constitute a single "provider" of interexchange service for the purpose of rate integration.[16] As demonstrated below, this interpretation conflicts with the express terms of the 1996 Act, violates traditional principles of statutory construction, and ignores legitimate business distinctions, as well as long-standing FCC policies.

### A. Section 254(g) Is Clear on Its Face, and Requires No Further Interpretation.

The Commission has vastly overstepped its authority by "interpreting" the 1996 Act in Paragraph 69 of the *Report and Order*. Section 254(g) contains no statutory ambiguity that would warrant deference to an agency interpretation under *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*[17] The statutory language is

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14 *Report and Order* at 9598.

15 *Id.* After concluding that parent companies include affiliates, the Commission determined that GTE – presumably meaning the parent, GTE Corporation, but stating only "GTE" – is a provider of interexchange services within Section 254(g).

16 While the Commission singles out GTE in Paragraph 69, presumably all affiliated carriers are subject to this same interpretation of "provider" in Section 254(g). In any case, the Commission never explains why it arbitrarily applied this interpretation to GTE. GTESC seeks clarification of this statement in its Petition.

17 467 U.S. 837 (1984); *see also Railway Labor Exec. Ass'n v. National Mediation*

clear. Congress expressly limited the rate integration requirement to a "provider" of interexchange telecommunications services that actually serves end user "subscribers."[18]

An analysis of other sections of the 1996 Act[19] further supports the conclusion that the Commission exceeded its authority by interpreting Section 254(g) as requiring rate integration across affiliates. In other provisions throughout the statute, where Congress meant to include "affiliates" within a definition, it expressly did so – a fact that strongly implies that the term "provider" in Section 254(g) does not encompass affiliated entities.[20] For example, Section 224(g) states that a utility engaged in the "provision of telecommunications services" shall impute to its costs and charge "any affiliate" the

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*Board*, 29 F.3d 655, 671 (D.C. Cir. 1994).

18 *See* 47 U.S.C. § 254(g).

19 Under the principles of statutory interpretation, a court will examine the text and structure of a statute as a whole to determine Congressional intent. *See, e.g.*, *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 112 S. Ct. 1394, 1401 (1992) ("In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole.").

20 *See, e.g.*, *Brown v.* Gardner, 115 S. Ct. 552, 556 (1994) (quoting *Rusello v. United States*, 464 U.S. 16, 23 (internal marks omitted) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655, 666 (D.C. Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 1392 (1995) ("The fact that Congress omitted equivalent language . . . cannot be deemed unintentional or immaterial.")

relevant pole attachment rate.[21] A separate provision, Section 271, prohibits a Bell operating company or "any affiliate" of a Bell operating company from providing interLATA services.[22] In addition, Section 572(a) prohibits a local exchange carrier or "any affiliate" of such carrier from acquiring a cable company in the local exchange carrier telephone area.[23]

The legislative history of the 1996 Act further underscores the conclusion that Section 254(g) does not require rate integration across affiliates. Indeed, the Conference Report explains that "the conferees expect that the Commission will continue to require that geographically averaged and rate integrated services ... be generally available in the area served by a *particular* provider."[24] This reference to a "particular provider" again demonstrates that the rate integration obligation applies to each individual service provider. Thus, by interpreting the term "provider" in Section 254(g) to include a parent and its affiliates, the Commission not only dramatically changes the explicit direction of Congress – to apply the rate integration obligation to each service provider – but also ignores the traditional tools of interpretation.

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[21] 47 U.S.C. § 572(a).

[22] 47 U.S.C. § 271.

[23] 47 U.S.C. § 652(a).

[24] H.R. Conf. Rep. No. 104-458, at 132 (1996) *reprinted in* 1996 U.S.C.C.A.N. 124, 144 ("Joint Explanatory Statement") (emphasis added).

### B. Both the Law and the Actual Operations of the GTE-Affiliated Carriers Confirm That They Are, in Fact, Separate Operating Carriers.

Although the *Report and Order* suggests that GTE Corporation, the parent company, is the underlying provider of service, both the law and the actual operations of the GTE-affiliated carriers confirm that these affiliates are, in fact, separate operating carriers. Neither GTE Corporation nor its affiliate GTESC holds *any* carrier authorizations or holds itself out as a common carrier. FCC licenses or Section 214 authorizations are issued in the name of the GTE entity that in fact provides the service to customers. Similarly, state certifications and authorizations are issued in the name of the specific GTE operating entity that provides service in that state.[25]

As discussed above, GTE Corporation has several subsidiaries that are separate and distinct carriers, provide different telecommunications services to different subscribers, and are subject to different FCC oversight. There is no evidence to suggest that these affiliates are anything but separate and distinct operating carriers whose rates should not be integrated with each other.

Furthermore, the fact that FCC regulatory obligations for these different carriers vary supports treating them separately for rate integration purposes. For example, MTC is a vertically integrated carrier, providing local exchange, exchange access, and

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[25] In no state does GTE Corporation hold any certificate or other authorization to provide a telecommunications service. The GTE telephone operating companies hold their authorizations in their own name. GTE Card Services has separate authorizations in its name, and the same is true for other GTE affiliates.

interexchange services through a single corporate entity. As such, MTC is classified, under the Commission's *Competitive Carrier* policies, as a dominant carrier subject to price cap regulations for domestic interexchange services. It must therefore file tariffs on at least 14 days notice.[26]

In contrast, GTE Card Services is classified as a non-dominant interstate, interexchange service provider under the Commission's *Competitive Carrier* policies. As such, GTE Card Services operates under regulatory obligations requiring it (1) to remain a corporate entity separate from any affiliated LEC such as MTC or GTE Hawaiian Tel; (2) to maintain books and accounts separate from any affiliated LEC; (3) to take services from affiliated local exchange carriers only by tariff or generally available agreement; and (4) not to own transmission or switching facilities in common with a LEC. As a non-dominant carrier, GTE Card Services is allowed to file its tariffs on one-day's notice, without cost support, and with a presumption of lawfulness. The regulatory obligations for these two carriers are vastly different – again a fact supporting the conclusion that affiliates should be treated separately for purposes of rate integration.[27]

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26 In an Order released April 1997, the FCC ordered MTC to establish a separate affiliate for interexchange service within one year. *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area,* Second Report and Order, CC Docket No. 96-149; *and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Third Report and Order, CC Docket No. 96-61, FCC 97-142, ¶ 173 (released Apr. 18, 1997).

27 The *Report and Order* did not address fundamental conceptual problems that arise directly from requiring separate affiliates to integrate their rates. For

Finally, there is nothing in the record to show that any GTE provider of telecommunications service is trying to avoid *its* obligation to *its subscribers*, as required by the statute, or that the GTE operating companies are in any way "shams." Beyond suggesting that a carrier could try to use separate affiliates to avoid the rate integration requirements in Paragraph 69, the Commission makes no findings that any carrier has, in fact, done so. For the GTE carriers, separate affiliates have been providing service for years, sometimes organized separately because of business reasons and often for compliance with other FCC requirements. As noted above, Congress was quite aware that telecommunications providers have affiliates and was careful to specify the inclusion of affiliates when it wanted to include them. However, Congress plainly omitted the term "affiliates" from Section 254(g). No further interpretation is necessary.

### C. Congress Intended the Commission To Incorporate, Not Completely Alter, Existing Rate Integration Policies

The legislative history of Section 254(g) makes it clear that Congress intended the Commission "to incorporate the policies of geographic rate averaging and rate

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example, the FCC did not address the theoretical difficulty of integrating the rates of a dominant, vertically integrated price cap carrier with those of a non-dominant interexchange carrier. Nor did the FCC consider that its ordered rate integration would require carriers to cross-subsidize one another. This outcome would directly contravene other regulatory policies that prohibit such cross-subsidization.

integration of interexchange services,"[28] not engage in a complete overhaul. The rate integration policy established by the Commission's *Report and Order* completely conflicts with prior FCC policies. Indeed, the rate integration policy prior to the 1996 Act did not require any carrier to integrate rates across affiliates, as Paragraph 69 now requires for GTE Corporation. For example, although AT&T and Sprint were specifically ordered to rate integrate,[29] neither was required to rate integrate across independently controlled affiliates. In the Order approving GTE's acquisition of Sprint, Sprint was required to integrate Hawaii rates into its Mainland rates, but there was no requirement that Sprint integrate its rates with other affiliated carriers.[30]

Petitioners are unaware of any instance in which the Commission has ignored legitimate legal distinctions between corporate subsidiaries in addressing rate integration issues. Requiring each carrier to effectuate rate integration in its own rates, in fact, is consistent with many other Commission policies that regulate different telecommunications services separately, and, in fact, *require* separate affiliates to operate independently. There is nothing in the *Report and Order* to explain why the Commission was departing from past policies or to justify such a departure. Paragraph

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28 Joint Explanatory Statement at 132.

29 *See Integration of Rates and Services*, Memorandum Opinion, Order and Authorization, 61 FCC 2d 380, 392 (1976).

30 *Application of GTE Corporation And Southern Pac. Co. For Consent to Transfer Control of Southern Pac. Satellite Co.*, Memorandum Opinion and Order, 94 FCC 2d 235, 262-263 (1983).

69 in effect abrogates existing FCC policies that separate affiliates and prohibit cross-subsidies.

Although rate averaging and rate integration are intimately linked in Section 254(g), the Commission addresses them separately in the *Report and Order*. Nowhere in the section of the *Report and Order* dealing with rate averaging does the Commission define a "provider" to include a parent company and all its affiliates – let alone require that rate averaging must occur across affiliates. Nor did rate averaging prior to the 1996 Act include a requirement that it be done across affiliates. Rather than simply extend its preexisting rate integration policies to the offshore points, which is what Congress had intended,[31] the Commission carved out a separate and unique definition of "provider." The agency then established rules based on this definition solely for the purposes of rate integration, without any reasoned explanation for this significant departure from precedent.

* * *

As demonstrated above, the Petitioners are likely to prevail on the merits. By ordering rate integration across affiliates, the Commission has overstepped the parameters of its authority under the 1996 Act, violated traditional rules of statutory interpretation, contradicted long-standing corporate legal distinctions, and ignored clear Congressional direction to incorporate past FCC policies.

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[31] The Conference Report states that Congress simply intended for the FCC to apply the policies contained in its prior rate integration decisions to the offshore points, not to adopt drastic changes. Joint Explanatory Statement at 132.

## II. MTC AND OTHER GTE AFFILIATES WILL SUFFER IRREPARABLE HARM ABSENT A STAY BECAUSE THE COMMISSION'S RULING WILL RESULT IN UNRECOVERABLE LOSSES AND TREMENDOUS UNCERTAINTY IN THE MARKETPLACE.

If the Commission's requirement of rate integration across affiliates is allowed to stand, this mandate will cause immediate and irreparable harm to GTE Corporation and its affiliates, particularly MTC. By requiring MTC to integrate its rates with, for example, those of GTE Hawaiian Tel and GTE Card Services, the Commission has effectively ordered MTC to charge non-compensatory rates, thereby incurring significant unrecoverable losses.

Currently, MTC obtains transmission capacity for interexchange traffic originating from customers in the CNMI via the INTELSAT, an international satellite system, at a cost reflecting higher international satellite rates.[32] In the "final plan" submitted by GTE Corporation on June 2, 1997, MTC had to propose rates that are below the cost of operating in a remote Pacific location. Thus, if the Petition remains unresolved by the relevant filing deadlines, MTC could lose money on every call made by its customers in the CNMI, and the resulting losses would be unrecoverable.

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[32] There are currently no domestic facilities connecting the CNMI to the U.S. Mainland. MTC has recently constructed a cable between the CNMI and Guam that will be interconnected with other cables reaching domestic points within the next few months. Nonetheless, MTC will continue to incur international satellite costs because of long-term contractual commitments.

While it is true that "economic loss does not, in and of itself, constitute irreparable harm,"[33] that general principle applies only where "adequate compensatory or other corrective relief will be available at a later date . . . ."[34] In fact, the courts and the Commission have repeatedly recognized that the threat of non-recoverable economic loss constitutes irreparable harm justifying a stay or other injunctive relief.[35]

As recently as last fall, the Eighth Circuit concluded that the threat of unrecoverable economic loss qualified as irreparable harm where the FCC's proxy pricing rules for interconnection forced incumbent LECs to offer their services at prices below actual costs.[36] In granting the stay, the court found that "the incumbent LECs would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules [ ] [were] eventually overturned," and "would be unable to fully recover such losses merely through their participation in the market."[37]

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33 *Wisconsin Gas*, 758 F.2d at 674.

34 *Id.* (quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

35 *See, e.g.*, *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (court found threat of irreparable harm where party would not be able to recover damages); *Airlines Reporting Corp. v.* Barry, 825 F.2d 1220, 1227 (8th Cir. 1987) (same); *Battlefield Cable TV Co.*, 10 FCC Rcd 10591 (Cab. Serv. Bur. 1995) (Bureau granted stay of refund order where revenues refunded would be unrecoverable); *Cablevision of New York*, 10 FCC Rcd 12279 (Cab. Serv. Bur. 1995) (same).

36 *Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996).

37 *Id.*

In the case at hand, MTC will suffer economic losses that likewise will be permanently unrecoverable. If MTC files a tariff that complies with the Commission's ruling, and GTESC is later successful in its Petition effort, MTC still will have sustained unrecoverable losses during the intervening time period. Furthermore, there is no legal remedy for recouping such losses since the Commission cannot be compelled to make MTC whole even if the *Report and Order* is later overturned.

Nor can MTC recoup these losses by raising its rates above competitive levels for other services. MTC is a vertically integrated carrier providing local exchange, exchange access, and interexchange services through a single corporate entity. As such, if MTC were to raise its local access rates to recover losses incurred due to the FCC's mandated non-compensatory pricing, it would be cross-subsidizing its interexchange losses. Surely, neither the FCC nor the local government of the CNMI would countenance such a result.

The Commission's inaction also poses harm to MTC by threatening to undermine its credibility in the marketplace. Lowering rates to comply with the Commission's mandate and subsequently raising them to previous levels, should the Commission's ruling later be deemed invalid, could have severe competitive implications for MTC. MTC could be competitively disadvantaged as customers perceive themselves to be on a "rate rollercoaster."

Finally, any suggestion that GTE Corporation, the parent company, could recover the losses suffered by MTC is without merit. GTE-affiliated carriers either face strong competition or are subject to rate regulation (or both) and, therefore, have no ability to charge supra-competitive prices to make up any shortfall. Moreover, such a suggestion would *require* GTE affiliates to engage in cross-subsidization – behavior that would directly contravene existing federal and FCC policies.[38] Thus, clearly there will be no available avenue for MTC or GTE Corporation to recoup any losses should the Commission's ruling stand.

In addition to the permanent economic losses that MTC will suffer if the Commission's ruling is upheld, there is considerable uncertainty in the marketplace due to the Commission's failure to act on GTESC's Petition. MTC faces the dilemma of either (1) complying with the Commission's mandate by the August 1 deadline, which would result in significant unrecoverable costs as explained above, or (2) failing to comply, which carries with it the potential for sanctions. Neither result is especially appealing. Moreover, time is of the essence since MTC will need to file its rate-integrated tariff for the CNMI by July 17, 1997, to ensure its effectiveness by the August 1 deadline.

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[38] Separate entities are often required to prevent cross-subsidies between carriers. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Notice of Proposed Rulemaking, 11 FCC Rcd 18877 (1996). Mandating rate integration across affiliated service providers, as ordered by Paragraph 69, would require cross-subsidization between affiliates, clearly contrary to past Commission policy. For example, Paragraph 69 appears to require MTC, a dominant provider of interexchange services, and GTE Long Distance, a non-dominant reseller, to cross-subsidize their interexchange service rates, contrary to a host of FCC policies

The Commission's inaction also threatens to harm other GTE affiliates, several of whom will be required to file tariffs with the FCC by August 1. Just as MTC is unsure whether or not it must integrate its rates with other GTE affiliates, these other affiliates do not know whether to integrate their rates with MTC or risk violating a Commission ruling that is under challenge and which they believe to be unlawful.[39]

* * *

As demonstrated above, MTC and other GTE affiliates will be irreparably harmed if they comply with the Commission's *Report and Order* while waiting for a ruling on the pending Petition. Accordingly, the Petitioners urge the Commission to grant the requested stay.

## III. A STAY WILL NOT HARM OTHER PARTIES.

Granting the stay will not harm any third parties because such action will merely preserve the *status quo* during the pendency of this proceeding. A stay will harm neither consumers nor competitors. First, consumers in the CNMI are not "entitled" to rate integration across separate carriers. They are entitled merely to integrated rates from their particular provider. Thus, any concern that a stay will harm consumers is unfounded.

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39 In addition, some GTE affiliates are not just unsure whether they must integrate their rates with the rates of other affiliates, but are also uncertain about with *which* affiliates they must integrate rates. In its Petition, GTESC asked the Commission to clarify whether it meant *all* GTE carriers (including CMRS providers and resellers) are to integrate rates, or just those carriers providing interexchange services to or from a particular offshore point.

In fact, rate integration across affiliates, as ordered by the Commission, will result in an unwarranted windfall for consumers in insular areas such as the CNMI. As discussed earlier, requiring MTC to rate integrate across all GTE affiliates will result in significantly low rates that are non-compensatory. MTC will essentially be forced to offer rates that do not accurately reflect the higher cost of providing service in the CNMI.

Significantly, grant of the stay will help protect and foster competition in the telecommunications market of the CNMI. Requiring MTC to offer significantly low rates could disadvantage MTC's long distance competitors, PCI Communications, Inc. ("PCI") and IT&E Overseas Inc. ("IT&E").[40] Because these competitors do not have any affiliates on the U.S. Mainland with which to integrate rates, they will face a Hobson's choice of continuing to charge rates that reflect the higher cost of providing service in the CNMI,[41] or operating at a loss for those services. This conundrum obviously may also stifle competition by eliminating the ability or incentive for future competitors to enter the market.

To ensure that the stay does not harm third parties, the Commission could require MTC to implement an accounting mechanism while a decision on GTESC's Petition is pending. The difference in the revenues collected could be scrupulously

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[40] PCI and IT&E offer direct-dialed originating interexchange and international services in the CNMI.

[41] For example, see IT&E's proposed rate integration plan filed with the FCC on June 2, 1997 showing rates from the CNMI ranging from 55 to 99 cents.

accounted for by MTC and distributed with the appropriate interest in the event that the *Report and Order* remains valid. Imposition of such an accounting mechanism is far more desirable than forcing MTC to charge non-compensatory rates that will result in major unrecoverable losses.

## IV. A STAY WILL SERVE THE PUBLIC INTEREST.

The public interest is advanced by a Commission that complies with past policies, acts expeditiously, and provides guiding principles, when necessary. As demonstrated more fully above,[42] the Commission's requirement of rate integration across affiliates contravenes the Commission's earlier rate integration policies. First, the rate integration policy prior to the 1996 Act did not require any carrier to integrate rates across affiliates, as the *Report and Order* requires for GTE Corporation. Second, requiring each carrier to effectuate rate integration in its own separate rates fully comports with many other Commission policies that regulate different telecommunications services separately, and, in fact, *require* separate affiliates to operate independently. Third, the closely linked requirement of rate averaging does not require averaging across affiliates.

Nowhere in the section of the *Report and Order* dealing with rate averaging does the Commission define a "provider" to include a parent company and all its affiliates – let alone require that rate averaging must occur across affiliates. Nor did rate averaging

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[42] For a more complete discussion of how the Commission's ruling contradicts past FCC rate integration policies, see *supra* text at 14-16.